

Claims 1-11, 13-24, 27 and 28 are rejected under 35 U.S.C. § 102(b) as being anticipated by Lerch (DE 199 52 359 C1).

Claim 12 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Lerch in view of Akerfeldt (US 6,508,828) and Bonutti (US 6,045,551).

Applicants respectfully traverse these rejections in view of the following comments.

#### Summary of November 29, 2007 Telephone Interview

On November 9, 2007 Applicants' undersigned counsel conducted a telephone interview with the Examiner to discuss the differences between Applicants' claim 1 presented in the Amendment filed on July 9, 2007 (mailed July 3, 2007) and the Lerch reference. In particular, Applicants' counsel indicated that Lerch discloses a recess 72 for fixing a wire, not a hook element which penetrates into a tension band. The Examiner indicated that a broad definition of a hook element is anything that catches the wire, and since claim 1 recites only a "hook element" with no additional structure, the recess 72 of Lerch meets this claim language. Applicants' undersigned counsel argued that the recess 72 of Lerch could not penetrate into the wire as claimed in Applicants' claim 1. The examiner indicated that this was functional language which carried little weight in the claim interpretation, and as long as the reference could broadly be interpreted to meet this function, the rejection was proper. The examiner then explained that at the *microscopic level*, the surface roughness of the plate or interior of the recess would penetrate into the wire and hold it. Accordingly, no agreement was reached during the telephone interview.

#### Discussion of Double Patenting Rejection

Claims 1-24, 27, and 28 are rejected on the grounds of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-25 of U.S. patent no. 7,238,188. Independent claim 1 of U.S. patent no. 7,238,188 ("related patent") specifies, in part:

*a connecting device which extends through the spacing gap and which, when the bearing elements are moved towards one another, connects said bearing elements together by*

*means of a latching or a clamping connection such that the bearing elements are no longer able to be moved apart, and*

*a thread-like tensioning element which is passed through the outer bearing element in a displaceable manner and, when tensioned, moves the inner bearing element towards the outer bearing element forming an additional connection between the two bearing elements.*

Thus, this claim of the related patent is directed to an implant which has a connecting device that forms a latching or clamping connection. In contrast, with claim 1 of the present application, one or more hook elements for fixing the at least one tension band relative to the outer abutment element are provided, wherein the at least one tension band is fixable relative to the outer abutment element by penetration of the one or more hook elements into the at least one tension band.

None of the claims of the related patent disclose or remotely suggest a hook element which penetrates into the tension band to fix the tension band to the outer abutment element, as set forth in claim 1 of the present application. Accordingly, the subject matter of the claims of the present application is patentably distinct from the claims of the related patent.

Applicants respectfully request withdrawal of the Terminal Disclaimer requirement.

The provisional double patenting rejections will be addressed if/when the related pending applications issue prior to issuance of the present application.

#### Discussion of Lerch

Claims 1-11, 13-24, 27 and 28 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Lerch. This rejection is respectfully traversed. An anticipation rejection requires that each and every element of the claimed invention as set forth in the claim be provided in the cited reference. See *Akamai Technologies Inc. v. Cable & Wireless Internet Services Inc.*, 68 USPQ2d 1186 (CA FC 2003), and cases cited therein. As discussed in detail below, Lerch does not meet the requirements for an anticipation rejection.

DE 199 52 359 C1 to Lerch has a U.S. counterpart, US 2002/0156475 A1 as identified in Applicant's Information Disclosure Statement filed with the present application. In the

discussion below, references are made to the U.S. counterpart of Lerch rather than the German language reference.

Claim 1 specifies that one or more hook elements are provided for fixing the at least one tension band fixable relative to the outer abutment element and that the at least one tension band is fixable relative to the outer abutment element by penetration of the one or more hook elements into the at least one tension band.

As discussed with the Examiner, Lerch does not disclose or remotely suggest a hook element that can penetrate into the tension band for fixing the tension band relative to an outer abutment element, as claimed by Applicants. The Examiner identifies the reference numerals 54, 72 of Lerch as hook elements. However, reference numeral 54 of Lerch denotes a peg element on which the thread or wire 28 is wound around (Para. 0095). Further, reference numeral 72 of Lerch is a clamping seat which is formed as a fixing recess into which the thread or wire 28 can be clamped in order to fix the latter in relation to a second bearing element 66 (Para. 0097).

The Examiner asserts that the surface roughness of the wedge-like recess 72 would partially penetrate into the thread to prevent it from slipping (Office Action, sentence bridging pages 4-5). During the telephone interview the Examiner explained this reasoning further, indicating that at the microscopic level the roughness of the surface of the recess 72 would penetrate into the thread 28. Applicants respectfully disagree with the Examiner's overly broad reading of the reference. There is no disclosure of Lerch that the surface of the recess 72 is rough. Further, one skilled in the art would appreciate that the clamping action of Lerch comes from the wedge-like shape of recess 72, and not from any surface roughness of the recess.

In addition, the use of a recess to fix a thread is directly contrary to the use of a hook element to fix a thread, so that Lerch can be seen to teach away from Applicants' claimed invention. In Lerch, the thread is clamped by the recess 72 so that the sides of the recess partially surround the thread, while with Applicants' claimed invention, the hook element penetrates into the tension band so that the band surrounds the hook element.

Accordingly, Lerch does not disclose or remotely suggest the use of a tension band and fixing the tension band relative to the outer abutment element with one or more hooks which penetrate the tension band, as claimed by Applicants.

As Lerch does not disclose each and every element of the invention as claimed, the rejections under 35 U.S.C. § 102(b) are believed to be improper, and withdrawal of the rejections is respectfully requested. See, *Akamai Technologies Inc., supra*.

Applicants respectfully submit that the present invention is not anticipated by and would not have been obvious to one skilled in the art in view of Lerch, taken alone or in combination with any of the other prior art of record.

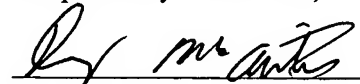
Further remarks regarding the asserted relationship between Applicants' claims and the prior art are not deemed necessary, in view of the foregoing discussion. Applicants' silence as to any of the Examiner's comments is not indicative of an acquiescence to the stated grounds of rejection.

Withdrawal of the rejections under 35 U.S.C. § 102(b) and 35 U.S.C. § 103(a) is therefore respectfully requested.

#### Conclusion

The Examiner is respectfully requested to reconsider this application, allow each of the pending claims and to pass this application on to an early issue. If there are any remaining issues that need to be addressed in order to place this application into condition for allowance, the Examiner is requested to telephone Applicants' undersigned attorney.

Respectfully submitted,



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